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CHARLES ELMORE

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1945

**No. 378**

AMERICAN BOWLING & BILLIARD CORPORATION,  
*Petitioner,*

*vs.*

THE BRUNSWICK-BALKE-COLLENDER COMPANY,  
*Respondent,*

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI.**

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**I.**

**OPINIONS OF THE COURTS BELOW.**

The District Court's opinion is reported at page 294 of 60 U. S. P. Q. and printed in the record at page 106 of Volume A. The Court of Appeals' original opinion and opinion on rehearing are reported at page 69 of 150 F. (2d), and are printed respectively at pages 32 and 52 of Volume C of the record.

**II.**

**STATEMENT OF THE CASE.**

Respondent for one hundred years has been engaged in the business of manufacturing and selling bowling alleys and bowling alley equipment, including bowling pins (Vol.

A, p. 30). In 1933 respondent adopted its registered Red Crown trade-mark "to once and for all eliminate any possibility of confusing a Brunswick pin with that of competitors \* \* \* in the minds of the bowlers or the bowling alley proprietors" (Vol. A, p. 34). Respondent spent hundreds of thousands of dollars advertising its Red Crown trade-mark and has sold over ten million pins bearing that mark (Vol. A, pp. 34, 35).

Petitioner was not organized until 1937 (Vol. A, p. 42). In 1938 it adopted its infringing mark comprising a red band of connected diamonds. Before the infringing mark was adopted petitioner's attorney advised petitioner that it would be "treading on unsafe grounds" (Vol. A, p. 53) and propounded the question whether a bowler "is likely to mistake your product with the diamond mark thereon as a Brunswick-Balke-Collender Product." (Letter, Deft.'s Exh. D, Vol. A, p. 134). Several officers of petitioner compared pins, bearing the Red Crown marks and the Red Diamond band mark, from a distance of 60 to 65 feet and found that the Red Diamond band mark served their purpose as it was difficult to distinguish it from the Red Crown (Vol. A, pp. 43, 44).

All manufacturers of bowling pins, except petitioner, use distinctive marks, such as a blue band, a purple band, stars, spaced stripes, etc. (Vol. A, p. 102), around the necks of their pins so that bowlers may distinguish them. Respondent and petitioner prominently display their respective "Red Crown" and "Diamond" band trade-marks in their extensive advertising literature and much of respondent's literature is directed and prepared to appeal to the bowler (Vol. A, pp. 34 to 37). The mark has value to the alley owner or proprietor because "he satisfies his trade with that mark" and he "picks them out for the selling point" to the bowlers (Vol. A, pp. 55, 79).

The District Court found in its Finding of Fact No. 3 (Vol. A, p. 112):

*"Its (Petitioner's) selection of the mark was made with the knowledge that its likeness to the plaintiff's device was arguable. As composed, this mark constitutes an imitation that might mislead a buyer or a bowler into a belief that the defendant's pin was manufactured by the plaintiff."\**

The District Court also found in its Opinion (Vol. A, p. 108):

*"We find the defendant's device confusingly like the plaintiff's mark. The defendant's officers knew it might be thought so when they adopted it."*

The Court of Appeals adopted these findings, saying in its Opinion (Vol. C, pp. 34, 35):

*"There was evidence that at a distance of 60 to 65 feet, the two bands appeared similar. Plaintiff's band was on its two top grade pins. These pins sold at higher prices than those of defendant's. The two marks seem to the majority of the court to be confusingly similar. The identity of color, of location on the pin, of the upper half of the mark—all substantiate the trial court's finding: 'We find the defendant's device confusingly like the plaintiff's mark. The defendant's officers knew it might be thought so when they selected it. There was evidence that their composition of it was not only knowing but intended to create similarity but we decline to comment further'."*

\* \* \*

*"Upon all the evidence, with all the possible conflicting inferences, the majority of the court feels required to accept the district court's findings on this disputed fact issue. Indeed, the majority considers that finding the correct view of the evidence, believing it in fact impossible to conclude other than that de-*

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\*Italics ours throughout, unless otherwise indicated.



fendant adopted its mark because of its similarity to plaintiff's, which was used so extensively on plaintiff's pins."

Petitioner's sole "question" (p. 10) and its assignment of error (No. 5, p. 13), as to the trade-mark infringement issue are founded upon the false premise that the Trial Court made "findings" that "there is not and cannot be any confusion between the goods of petitioner and respondent with their respective trade-marks therein, either to the purchasers or users of those goods."

The Trial Court's Finding No. 3, from which we have quoted above, is to the direct contrary. It clearly negatives petitioner's false premise. So likewise does the holding of that Court in its opinion: "We find the defendant's device confusingly like the plaintiff's mark". No reference is made by petitioner either to this Finding or holding.

Petitioner's false premise cannot reasonably be spelled out of that portion of the District Court's Opinion quoted on page 5 of the petition. That portion has to do *only* with the question of damages because of petitioner's unfair competition. The Court had already stated in its Opinion that the marks were confusingly similar and that petitioner was guilty of infringement of respondent's registered trade-mark.

On page 10 of the petition is the further false premise that the Court of Appeals "adopted, undisturbed" several presumed findings of the District Court, including petitioner's imaginary one that there "could not be any confusion" on the part of bowlers. Indeed, the Court of Appeals held exactly the contrary, as shown by our above quotation from the Opinion of that Court.

The statements on page 10 of the petition that the District Court found "*all* marks would be indistinguishable"

to the bowler and that the Court of Appeals "adopted" such findings are also groundless in fact. Neither Court made any such finding and could not have done so properly in view of the evidence. It is most significant that while petitioner pretends that the marks have no significance to anyone, yet petitioner has doggedly persisted at great expense and inconvenience in using the infringing mark in the face of the filing of the suit, the District Court's decree and the Court of Appeals' affirmance. All other pin manufacturers have adopted distinctive marks around the necks of their pins.

We also challenge the statement appearing on pages 9 and 10 of the petition, that the District Court found that bowlers "were not purchasers of the trade-marked goods—they were merely users". There is no such finding. What the District Court *did* say was (Vol. C, p. 23):

"The suggestion was that the bowler is the ultimate consumer or the buyer. I was thinking of that proposition last night and today I am *convinced* that the Chicago judge did a fine job. I think that *the bowler is the buyer.*"

The District Court was referring to Judge Barnes' decision in respondent's suit against National Billiard Supply Co., (43 U. S. P. Q. 10, N. D. Ill., 1939), in which the Court found a wide red band to be confusingly similar to respondent's Red Crown mark and stated (p. 13) that "the ultimate consumers are the bowlers", who are "fussy" about the pins, and that "The proprietors of bowling alleys try to please them or deceive them."

There is no support in the record of this case for petitioner's statement (p. 2) that the pins and other supplies purchased under the "Sweepstakes" plan "represented the seasonal requirement of the bowling alley proprietors for such pins and other supplies for each alley,

and eliminated competition with respondent in the sale of such materials."

### III.

#### ARGUMENT.

Point A. *Petitioner's Trade-Mark Infringement "Question" is Without Merit and The Petition Should Be Denied As To It.*

As Petitioner's "Question" and corresponding assignment of error are based on a premise which has no foundation in fact whatsoever—the contrary to the premise being the true fact—the petition as to the trade-mark matter is entitled to no standing in this Court and should be denied.

There are *concurrent* findings as to the matter of confusion, and evidence supporting them, and under such circumstances this Court has repeatedly and consistently held it would not disturb such findings. *Goodyear Tire and Rubber Co. v. Ray-D-Vacco*, 321 U. S. 275, 278 (1944).

The *only* ground upon which petitioner (p. 11) invokes the discretionary power of this Court on the trade-mark "Question" is that it is "of great public importance". Even if that question were not based on a false premise it would not be of public interest. It involves merely a question of fact of interest only to the parties to this private suit. This Court has repeatedly and consistently held that it will not grant a petition for writ of certiorari under such circumstances. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 (1924); *United States v. Johnston*, 268 U. S. 220, 227 (1925).

Point B. *The Exclusion of the Order of the Federal Trade Commission From Evidence Involves No Conflict of Decisions and No Question of Federal Law Which Should Be Settled By This Court.*

The petition for a writ of certiorari proposes that the question of the admissibility in evidence, pursuant to Section 5 of the Clayton Act (15 U. S. C. 16), of an order of the Federal Trade Commission made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21) and finding a violation of Section 3 of the Clayton Act (15 U. S. C. 14), is an important question of federal law which should be passed upon by this Court. Respondent submits, however, that there is no occasion for consideration of the question by this Court since the answer is obvious upon the face of the pertinent statutes.

To come within the provisions of Section 5 of the Clayton Act (15 U. S. C. 16) there must, among other requirements, be presented a "final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity \* \* \*." Obviously, an order of the Federal Trade Commission, made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21), was rendered in an administrative proceeding and not in a "criminal prosecution" or in a "suit or proceeding in equity."

The Clayton Act does not confer jurisdiction solely upon the Federal Trade Commission to enforce its provisions. Jurisdiction is also conferred upon other administrative agencies to enforce compliance with Sections 2, 3, 7 and 8 by persons respectively subject thereto (Section 11, 15 U. S. C. 21). The procedure outlined in Section 11 is uniformly applicable to each of said administrative agencies.<sup>1</sup>

A comparison of the use of the language "suit or proceeding in equity" in Section 5 of the Act (15 U. S. C. 16) with the use of the term "proceeding" in Section 11 (15 U. S. C. 21) shows that the words "suit or proceeding in equity" were used designedly by the Congress.

<sup>1</sup> Interstate Commerce Commission, Federal Communication Commission, Civil Aeronautics Board, Board of Governors of the Federal Reserve System and Federal Trade Commission.

Neither is such an order of the Federal Trade Commission a "judgment or decree" as that term is used in Section 5 of the Clayton Act (15 U. S. C. 16). It is merely an administrative order. This distinction was also understood by the Congress, as can be seen upon a comparison of the use of the term "order" in Section 11 of the Act with the use of the terms "judgment or decree" in Section 5 and "judgment" in Section 11.

Moreover, such an order of the Federal Trade Commission is not "final" in that it remains open to appeal upon petition to a Circuit Court of Appeals and may be modified or set aside by the Federal Trade Commission at any time. By the provisions of Section 5 of the Clayton Act it was not intended that a final judgment for damages be entered upon the evidence of an order of the Federal Trade Commission, where the order might be modified, set aside or reversed after the judgment for money damages had become final. *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 368-370 (D. Minn. 1939).

~~Petitioner~~  
~~Respondent~~ has suggested that an amendment to the Federal Trade Commission Act, 15 U. S. C. 45(g)(1), has in some way resulted in an amendment to Section 11 of the Clayton Act (15 U. S. C. 21), with the result that orders of the Federal Trade Commission, pursuant to the latter Act, become final by reason of the amendment to the former. It is apparent from a reading of 15 U. S. C. 45 that all of its provisions refer to proceedings of the Federal Trade Commission pursuant to the power granted by 15 U. S. C. 45(a). The lack of any relationship whatsoever between 15 U. S. C. 45 and 15 U. S. C. 21 becomes apparent upon a comparison of the pecuniary penalty for violation of the Commission's order imposed by 15 U. S. C. 45(1) to be recovered in a civil action with the provisions of 15 U. S. C. 21 for the enforcement of orders of the Federal Trade

Commission and the other administrative agencies by Circuit Courts of Appeal. The provisions of 15 U. S. C. 45(g) regarding finality do not, as petitioner would have us believe, speak of *all* orders, but refer only to orders of the Federal Trade Commission made pursuant to the grant of power in 15 U. S. C. 45(a).

~~Petitioner's~~  
~~Respondent's~~ suggestion that the amendment to 15 U. S. C. 45, a part of the Federal Trade Commission Act, is applicable to orders of the Federal Trade Commission made pursuant to Section 11 of the Clayton Act (15 U. S. C. 21) would result, without reason, in having the provisions of the Clayton Act enforced by a different procedure by the Federal Trade Commission from that prescribed to be followed by the other administrative agencies. The Federal Trade Commission Act (15 U. S. C. 45), the amendment to which petitioner relies upon, contrary to the Clayton Act, is applicable only to the Federal Trade Commission. It is obvious that no change was intended by this amendment in the legislative purpose to provide a uniform procedure for enforcement of the Clayton Act by all of the administrative bodies mentioned in Section 11 of the Clayton Act (15 U. S. C. 21). The administrative interpretation of the procedural provisions of Section 11 of the Clayton Act (15 U. S. C. 21) and of the Federal Trade Commission Act (15 U. S. C. 45) is consistent with respondent's position. In the annual report of the Federal Trade Commission for the fiscal year ending June 30, 1944, page 22, the following appears:

"Under the Clayton Act, an order to cease and desist does not become final by lapse of time. The order must be affirmed by a United States circuit court of appeals on application for review by the respondent or upon petition of the Commission for enforcement. Thereafter, appropriate contempt proceedings may be brought in the particular court of appeals for violation of the court order."

## IV.

## CONCLUSION.

There are no "specil and important reasons" for granting the present petition; certainly none of the character of those specified in Rule 38 of this Court. We submit that the petition should be denied.

Respectfully submitted,

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Dated: September 19, 1945.

